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In the Supreme Court of the United States

OCTOBER TERM, 1973

BERNARD BERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-411

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner and two co-defendants were convicted of conspiring to possess and possessing securities stolen from the mail, in violation of 18 U.S.C. 371 and 1708. Petitioner was sentenced to concurrent terms of three years' imprisonment, subject to the parole provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed (Pet. App. 1-19). The sole issue raised by petitioner concerns the propriety of the judge's instruction with respect to the inference that could be drawn from possession of the stolen securities.

The evidence, which is set out at length in the opinion below, showed that petitioner, working with Pedro Martinez, A. Earl Walters, and Stephen J. Dineen,[1]

[1] Martinez and Walters were tried and convicted with petitioner. Dineen's prosecution was severed after he failed to appear for trial.

arranged for the purchase and disposition of Chesapeake and Potomac Telephone Company bonds, in the face amount of $500,000, which had been stolen from the United States mails eleven months earlier. Petitioner testified in his own behalf and denied any knowledge that the bonds were stolen, even though he and his confederates purchased them for only $50,000 in cash.

Petitioner contends that evidence of possession of stolen securities eleven months after their theft should not permit the trial court to charge the jury that a reasonable inference could be drawn therefrom that the possessor knew the securities were stolen. But the instruction challenged here was in fact made in accordance with petitioner's own request. At a conference prior to the closing arguments and charge to the jury, petitioner's counsel requested an instruction on possession of recently stolen property (Tr. 1120, 1138-1139). Although counsel for Martinez and Walters objected to the instruction (Tr. 1121-1122, 1140), the judge agreed to give it (Tr. 1138-1140). The instruction given emphasized the doubtfulness of any inference based merely upon possession of property stolen at a considerably earlier point in time (Tr. 1322-1323):

> Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of the surrounding circumstances shown by the evidence in the case that the person in possession knew the property had been stolen.
>
> * * * * *
>
> The term "recently" is a relative term and has no fixed meaning. Whether the property may be considered as recently stolen depends upon the nature

> of the property and all of the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

At the conclusion of the charge, co-defendant Martinez objected to the instruction (Tr. 1335-1336), and co-defendant Walters joined in the objection (Tr. 1336). Petitioner did not join in the objection, which was overruled (Tr. 1337). Having requested an instruction on the inference to be drawn from possession of the securities and having failed to object to its specific terms, petitioner is now barred from challenging it on certiorari. Rule 30, Fed. R. Crim. P.

Moreover, the instruction was proper. This Court has recently approved instructions permitting inference of knowledge of theft from possession (*Barnes* v. *United States,* No. 72-5443, decided June 18, 1973), and the instruction here carefully guarded petitioner against an unwarranted inference by cautioning the jury that "[t]he longer the period of time since the theft, the more doubtful becomes the inference * * *."

There was, in any event, ample evidence from which petitioner's guilty knowledge could be inferred. Petitioner, a lawyer, must have known that valid securities of the kind purchased would not have been sold at 10 percent of their face value, and the elaborate scheme—involving a shell corporation, the "laundering" of checks, and the use of large sums of cash (see Pet. App. 1-3)—he devised to conceal the purchase transaction indicated awareness of the illegality lurking in the history of the bonds.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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